IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

NO76-174

MEAD JOHNSON & COMPANY, HAROLD SCHWARTZ, CAROLINA SUBURBAN CO., INC., and JOHN DOE and/or JOHN DOE, INC. (the defendant being the distributor of the product herein to Carolina Suburban Co., Inc.),

*Petitioners,*

*vs.*

FLORENCE L. GOODMAN and ROBERT J. GOODMAN, individually and as Executor of the Estate of FLORENCE L. GOODMAN, deceased,

*Respondents.*

## Brief in Opposition to Petition for a Writ of Certification to the United States Court of Appeals for the Third Circuit

William R.Morris
Counsel for Respondents
744 Broad Street
Newark,New Jersey 07102
(201) 642-0092

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BRIEF in Reply to Petition.

The unsupported conclusions in the petition required an extended reply brief. Cases (26) are cited in the petition that do not feature the facts, quote for substantiation, and are either inapposite or support appellee. The task was assumed by appellee. Attention of the Court is invited to extensive briefs filed below.

The enormity of the issue herein that the buyer be informed, affects an estimated 10 million women on oral contraceptives, of which some 750,000 have been on the sequential pill, the kind herein, aside from the grossly uncounted broadened field of medicants and consuming products with lack of warning to the public of their deleterious causes. The proportions are endemic, if not epidemic. It appears that as of February 26, 1976 the Federal Drug Administration issued a press release that the petitioner, Mead Johnson and Co. had withdrawn its pill Oracon from the market because of its hazardous risks, to wit thromboembolic conditions and cancer. Copies of the letter of the FDA, dated May 5, 1976, with enclosed press release are in the appendix herein. It is submitted that as in recall campaigns, consideration should be given to accord direct notice to physicians, pharmacies, other dispensors, and consumers of deleterious products.

Though the suit was filed February 25, 1971, or within 2 years of the biopsy showing cancer, it would appear that the withdrawal by the petitioner of its product about February 26, 1976 was the initial acknowledgement by petitioner to the public of the hazards of its product.



The petitioner impliedly warranted the safety and fitness for human consumption of its product, which until its withdrawal constituted a concealment of the cause of action that in common equity estops the alleged defense of limitations--aside from the extensive and studied opinion of the Circuit Court below. ROTHMAN v. SILBER, 90 N. J. Super. 22, 216 A. 2d 18 (App. Div. 1966) cited by petition (p.19) stressed fraudulent concealment of the effects of the anesthetic therein. KYLE v. GREEN ACRES, 44 N. J. 100, 207 A. 2d 513 (1965) quoting that the conscience of defendant renders his conduct such that he ought not to avail himself of limitations. The omission to disclose that which became the basis of withdrawal is the gravamen of that conscience.

The breath of the case is compounded by the required application of the 4 year limitation for breach of warranty for injuries under the Uniform Commercial Code adopted by 49 states (including New Jersey), the District of Columbia, and the Virgin Islands, and a reappraisal of ERIE R.R. v. TOMPKINS, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 185 (1938) with its causative and extensive judicial erosions relegating this government to 50 countries of laws as contra-distinguished from a federation of states. Confusion and judicial discord among states in the protection of its residents and non-residents are its net product. For the State of Ohio to have a "wilful negligence" statute ruling out a passenger of New Jersey in an automobile accident in Ohio, which New Jersey refused to follow as contrary to its public policy, or for a non-resident to be bound by French or

Napoleonic law of negligence in Louisiana MISKEL v. SOUTHERN FORD, 439 F. 2d 790, 5th Cir. (1971) appears to merit a considered long overdue reappraisal for its continuance. In RADFORD v. DOWDS, U. S. Dist. Ct., No. District of Ohio (1956), deceased was sent by the Pentagon to Ohio and while a passenger in an automobile, was injured in an accident. The suit, in which the writer appeared in his behalf, was governed by the "wilful negligence" of its guest law, contrary to the New York law where he resided.

For an estimated 50,000 household and other non-oral consumer products to warn of deleterious effect and to keep out of the reach of children, following the horizons opened by the writer's case of PIZZUTO v. S.C. JOHNSON & SON, U. S. Dist. Ct. of New York, Southern District, about 1936, and yet no products for oral consumption, is prejudicial paradox.

The petition (p. 1 and 2) says its application in the Circuit Court for rehearing was denied. The petition for a rehearing was en banc and significantly Judge Rosenn, who concurred and dissented in a separate opinion below, concurred in denying a rehearing.

The petition omits FEDERAL RULES OF CIVIL PRACTICE 56(c) cited and relied upon by the Circuit Court below, cited by the District Court below, and the fundamental basis of "Questions to be presented" (p. 2 of petition) which entitled appellee to a trial by jury herein. Rule 56(c) provides:

> "* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."



## REPLY TO QUESTIONS PRESENTED

Petition (p. 2) in its premise that knowledge of a cause of action by a person must under state law be decided by a judge without a jury, is inaccurate and inadequate. The case of LOPEZ v. SWYER, 62 N. J. 267, 300 A. 2d 563 (1973) relied upon by petitioner, stated that (p. 10a of appendix to petitioner's brief):

> "The determination by the judge should <u>ordinarily</u> be made at a preliminary hearing and out of the presence of the jury. (footnotes omitted. 62 N. J. at 274-75, 300 A. 2d at 567." (underscore ours)

To say that a federal court must follow such law is to abrogate Rule 56(c) entitling a litigant to a trial by jury and invokes adherence in a procedural issue to application of substantive law of a state under ERIE v. TOMPKINS, supra. The District Court, upon the argument, transcribed below in its acknowledged quandary, said there was an obligation to follow Federal "Rule 56(c) which prevents me from making factual determination on controverted facts*" rather than to follow a state procedure by the judge, and that it was aware of the fact that "it is settled

doctrine in the law to construe such motions wherever possible to preserve the constitutional right of trial by jury *".

The petition (second question) in presenting the admission that there is no state decision directly in point, that a per quod claim can be barred by the defense to the other spouse's claim, indicates that the Federal Court can hold it may not be barred under the ERIE-TOMPKINS case, supra, which ruled that the legislature or the law of the Supreme Court of the state governs. The defense that the husband's want of discovery is controlled by the wife's alleged knowledge is tenuous.

REPLY TO STATEMENT OF THE CASE.

Petition (p. 3) persists that Florence Goodman was "advised" to discontinue Oracon, and even before this Court omits that an unidentified girl who answered the doctor's telephone suggested it.

Petition (p. 4) again stated that Dr. Henry Goldbas said not to take Oracon, but omits to state that the doctor did not say that the pill caused the phlebitis. Again, petitioner omits that the doctor's hospital reference injected her long automobile trip with the phlebitis.

Petition (p. 4) again says plaintiff Florence Goodman noticed a lump on her right breast in December 1968. Petitioner omits that she had numerous lumps on her breast as early as 1964 which were benign. Again the omission that Dr. Skeets recommended, not surgery but a biopsy, and arranged for her admission on February 25, 1969. On February 27, 1969 the biopsy was the first knowledge of cancer known to man--and the complaint was filed within 2 years thereof, to wit February 25, 1971. No doctor, much less plaintiff, knew that the lump was cancerous until that biopsy. Every lump or elevation is not a cancer.



The petition fetches nil to deduct that plaintiff knew there might be a relationship between the pill and thrombophlebitis when she gave a history, including medication, to Dr. Nathan Dorman and Dr. Henry Goldbas. Besides, Dr. Dorman was a dermatologist.

Mere conference with counsel June 11, 1968 and procurement of the hospital record that she had taken Oracon and had thrombophlebitis, is no sound basis to say she knew there "might" be a cause of action. It confuses conjecture with no available expert medical opinion. The hospital record dispelled it.

The petition (p. 5) states that on or about November 28, 1969 counsel received a letter from Mr. Krim enclosing an advertisement that sounds as if it supports "my view", i.e. plaintiff's, of the pill. Mr. Krim was just an employee of a former employer and wrote, not of the pill, but that she could not take a job. By no stretch is talk or view or imagination by a plaintiff any basis for probity of medical opinion.

Petition (p. 5) refers to the deposition of Dr. Harold Schwartz taken November 22, 1974. Counsel knew, consented

thereto, and participated therein. No specificity of vagueness by Dr. Schwartz is mentioned, much less its relevance.

Petition (p. 6) again lends confusion by saying that Dr. Schwartz prescribed the pill, not for contraception but for menapausal complaints. Petitioner diverts from the inherent deleterious nature of its product when it enters the human body, be it for contraception, menapausal complaints, dermatitis, or otherwise. The product was inherently dangerous to the body and defendant omitted to warn the public of its risks.

Petition (p. 6) quoted the uncertainty of the Judge in the District Court:

> "I reach no conclusion, I don't know *".

The Circuit Court ruled that "his explanation was completely unsatisfactory*".

The petition (p. 7) quotes from the quandary of the Federal District Court Judge whether "I am permitted to do what a State Court Judge would do in this case*" Occult as it appears in his discretion, and then "If I'm not, whether, then, under Rule 56 there exists any factual controversy at all". Contrary to the plainly presented facts, particularly of Dr. Henry Goldbas--the family's treating-hospital physician--he stated as late as May 22, 1975 at her literal death door that he did not know whether the pill caused her condition; and as early as June 21, 1969 when she was hospitalized the first time, he said that she was on a long automobile



trip when her leg swelled--the thrombophlebitis. The District Court Judge completely disregarded the cancer that even under the equivocation of the New Jersey Supreme Court case of LOPEZ v. SWYER, supra, admittedly by the petitioner and the District Court was not discovered until February 27, 1969 when the St. Barnabas Medical Center laboratory did the biopsy. Obviously, Florence Goodman could not sue for an anticipated or a hopefully justified cancer. This had nothing to do with the death of Florence Goodman on May 22, 1973. Obviously she could not sue for an anticipated and correlative death.

The petition (p. 7) says the majority of the Court of Appeals, which reversed the District Court Judge, said there was at least a question as to whether the claim based on alleged thrombophlebitis noted about June 21, 1967, was a different cause of action from the cancer noted February 27, 1969--all aside from discovery of probative knowledge that either condition was caused by the pill which was first known in July 1971.

The petition (p. 7) misstated the opinion of the Circuit Court of Appeals in saying the Court ruled the husband's per quod claim was derivative. The Court said it was independent--and even if his independent damage was a right to sue deriving or emanating from her injury, his discovery date that the pill caused the thrombophlebitis and/or the cancer and/or the aggravation of the fibro-cystitis was different and the summary dismissal of his independent cause of action was error.

The rationale of LOPEZ v. SWYER, supra, on extension of limitations is discovery. The use of that very word applies to the husband's cause of action--discovery by him. To attach derivity to the husband's cause of action is a deprivation of his cause of action and due process. The term derivative lends a play on words --were it not for the spouse's injury, there would be no injury to the husband and not that a right or child dies with the parent. To deny his cause of action before he had knowledge is a deprivation of his cause of action and due process of law.

The petition (p. 7 and 8) mistook the opinion of the Circuit Court of Appeals and the District Court Judge that the District Court summarily dismissed the cause of action for the death of Florence Goodman since plaintiff's claim was time barred. Aside from the questionable logic, it is unconstitutional because an injury claim could be time barred, so could the heir's claim for a death after numerous hospital admissions more than 2 years after injestion of defendant's pill.

The petition (p. 8) comments that the Court of Appeals considered as improper the summary decision of the District Court on "late discovery" exception to the limitations statute in following the suggested administrative procedures of state court decisions. (Petitioner does not cite even one decision of the state court.)

The petition (p. 8) states that the dissenting judge in a Court of Appeals,



in partial agreement said he would have affirmed the District Court Judge as to the thrombophlebitis claim, evidently indicating that the District Court erred as to the cancer claim and the death claim.

## REPLY TO PETITIONER'S REASON FOR GRANTING THE WRIT.

Petition (p. 8) stated that the Federal Court in a diversity case should disregard "federal practice" and follow state court procedure as litigants, presumably plaintiffs and defendants, would go "forum shopping" despite their constitutional right in a diversity citizenship case. Petitioner casts the aspersion to litigants as "forum shopping". The rationale of human development, a part of which forms the jurisdictional, is to seek help for a better and just way. To be relegated to harsh and narrow-minded laws at times is a difference of degree, whether civil damages or civil rights. LOPEZ v. SWYER, supra, alerts avoidance of harsh laws. To deprive a person of recovery for the loss of his limbs or death of a provider can be as touching as the right to speak, vote, pray, eat, or be entertained to the beholder. The soul here needs the body.

The reason to premise the writ is inconsistant with petitioner's statement (p. 2) where petitioner tells this Court in Questions Presented "*that there is no state court decision in point*", and ventures (p. 9) that the Appeal Court interpreted state law not consistently.

Petition (p. 10) seeks substantiation for the dissent in Judge Rosenn's opinion, to wit BYRD v. BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958). This case is different in that the issue of employment is not necessarily non-jury; that the weight of the harshness of a limitation to equitable value is non-jury under LOPEZ v. SWYER, supra, that LOPEZ avoids forum shopping, that the majority in the Circuit Court undermined ERIE-TOMPKINS and increased the "burden" of diversity cases. If diversity has become a burden, our framing fathers shopped at the wrong storehouse.

The petition (p. 9) states that the state court "established" a balance and interwoven doctrine, really an administrative procedure which is contrary to the petitioner's basis for the question. Again petitioner cited LOPEZ v. SWYER, supra. Though counsel quotes (p. 13) from this case, light or nil is made of the statement therein:

> "* It is true that the time of discovery is a question of fact and so could be left to a jury *".

This language certainly is not decisive or mandatory to a trial judge of the state court or federal court to decide without a jury, but a suggestion or view; again differing with the petition (p. 10 and LOPEZ, and LOPEZ differing with Judge Rosenn.

The petition (p. 9) quotes from the dissenting opinion of Judge Rosenn that



leads him, not in complete but "some disagreement with the majority on the disposition of the claims presented", the majority following BYRD v. BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., supra, as part of the "outgoing saga" of reconciling the command of ERIE-TOMPKINS, supra, with the purpose of federal rules and federal policies. It is incomprehensible that authors of ERIE-TOMPKINS, supra, so summarily came upon the legal horizons and envisoned that its branch Federal Circuit in Louisiana would be tied by the law of negligence in that state and puppetized to follow French or Napoleonic law. Confidence in the judicial, legislative and executive directors that general uniformity or Federalization will not squelch individuality must have been the premise of our forerunners with checks and balances, not the sovereignty of a single state law reaching out to diverse state citizens who in the chain of interstate commerce were riding or consuming--synonymous.

The petition (p. 14) interprets LOPEZ as to what plaitiff "knew or should have known" and limits it to comment or impressions which has nothing to do with the cause of action. Certainly a comment or impression by a plaintiff that is not based upon probative or admissible expert knowledge is irrelevant.

The petition (p. 15) says that a judge would understand the distinction between a position that plaintiff knew or should have known, but "a jury may not". Such presumption lends ludicrous--in depriving a citizen thereof of his constitutional

right to a trial by jury--so inherent and so universal--the foundation of a jury and so sustaining by the courts as daily bread.

Petition (p. 15) says that LOPEZ was amplified by FOX v. PASSAIC HOSPITAL, 71 N. J. 122 (1976) and MORAN v. NAPOLITANO 71 N. J. 133 (1976) which sustained the plaintiff herein. Counsel dwells on the minority opinions in the New Jersey cases that plaintiffs should be limited to a "reasonable time" after discovery and not the 2 years under the statute, really legislating not juridicating, and contrary to the majority opinion.

The petition (p. 15) blows in two opposing directions: first that in MORAN and FOX, supra, the discovery rule possesses inherent capacity for prejudice to a defendant and yet on p. 12 that "* further inquiries as to prejudice, etc. were not even relevant*"; and quotes from a footnote in FOX, supra, that as to prejudice where the cause of action is discovered after the two year period, "we leave the matter, subject to what we said in Lopez, 62 N.J. at 276, for further consideration in a case presenting that precise issue." Here the discovery took place more than 2 years so the matter would be left for further consideration.

The petition (p. 16 and 17) states that even where discovery occurred after the 2 year period, defendant may show that 2 years from that date of discovery unusual prejudice occurred. To the very date of his brief, defendant had never



alleged nor much less shown any prejudice, and much less any unusual prejudice. Further to derogate the intelligence of a jury as unable to discern "a reasonable time" in which to start a suit where prejudice is justifiably alleged and evidenced, when the universal province of a jury is to determine reasonableness as an issue, is unprecedented.

The petition (p. 17) erroneously equates issue of statute of limitation where late discovery is involved with legal issue of jurisdiction, yet cites no precedent.

The petition (p. 19) cites EKALO v. CONSTRUCTIVE SERVICE CORP. OF AMERICA, INC., 46 N. J. 82, 215 A. 2d 1 (1965) and referred to the limited claim of the wife as distinguished from the husband, who recovered for medical bills incurred by him. The Court, according to petition's paraphrase, evidently merely said the claim of both spouses should be tried at the same time. Again, no issue of difference in discovery was involved. It was the incorporation of the wife's claim for consortium for injuries to the husband.

The BYRD case, supra, cited in petition (p. 10 and 11) appears on all fours with the case at Bar and strongly sustains the appellee. Therein, defendant in a personal injury suit claimed immunity from a negligence suit under a workmen's compensation statute on the ground that the work was part of the trade, business or occupation. By statute the work

issue was for determination by the Court and not the jury. The Court held, per Brennan, J. (p. 962):

> "We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity Guaranty Trust Co. v. York, 326 U. S. 99, 108 L. Ed. 2079, 2085, 65 S. Ct. 1464, 161 ALR 1231 and not a rule intended to be bound up with the definition of rights and obligations of the parties.
>
> "But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which in civil common law actions, it distributes trial functions between judge and jury, and under the influence--if not the command of the Seventh Amendment assigns the decisions of disputed questions of fact to the jury."

At page 963:

> "We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the



> judge-jury relationship in the federal courts."

In the instant case we have not even the exactitude of legislative pronouncement as in BYRD, supra, but an equivocation or open invitation in verbiage in LOPEZ.

Petition (p. 10) cites in paraphrase fashion from the concurrent and dissenting discussion of Judge Rosenn, who rendered inapplicable MAGENAU v. AETNA FREIGHT LINES, INC., 360 U. S. 273, 70 S. Ct. 1184, 3 L. Ed. 2d 1224 (1959) and the BYRD case, supra. In the former, the court said there was no reason to refer the issue of "employee relationship" to a judge rather than a jury with the other issues. In the latter, the Supreme Court ruled the employer's immunity in a negligence case is not an integral part of the statutory relationship and was not a non-jury issue. LOPEZ never said that relegation of the issue of discovery is an integral part of any statute or law as the petition (p. 11) attempted to infer. To the contrary, LOPEZ keeps open the door to jury determination. The petition (p. 11) stoutly confirms the sacredness of the trial by jury by the Supreme Court of New Jersey as a "mandate" to preserve it.

The Court, at p. 1228, repeating the BYRD case, supra, said:

> "As we said in that case 'an essential characteristic of (the federal system) is the manner in which, in civil common law actions, it distri-

butes trial functions between judge and jury' (assigning) the decisions of disputed questions of fact to the jury. Byrd v. Blue Ridge Electric Coop. Inc., supra (356 U.S. at 537) We found that the South Carolina rule in compensation cases, permitting courts to decide such factual issues without the aid of juries, was not 'announced as an integral part of the special relationship created by the statute'. Id 356 U.S. at 536. We held that under such circumstances 'the federal rule should not follow the state rule'. Id 356 U.S. at 538. The same reasoning applies here."

The MAGENAU and BYRD cases sustain appellee. They had a definitive rule or practice to keep out juries on certain issues and yet the Supreme Court disregarded same and upheld the right to a jury trial. In LOPEZ there was no definitive rule or practice and no ingredient of integrality.

In COLACURCIO CONTRACTING CORP. v. WEISS, 20 N. J. 258, 119 A. 2d 449 (1955) cited in petition (p. 11) a jury trial was had, a verdict rendered and set aside as against the weight of evidence. The Court held that the trial judge has such authority which does not affect the right to trial by jury. The Court, coincidentally Mr. Justice William J. Brennan, stated at p. 265:

> "* that the appellate court on such review shall give 'due regard to the opportunity of the trial court and the jury to pass upon the credibility of the witnesses' *".



Thus the rule in New Jersey is that credibility issues belong to judge and jury, not to judge alone, sustaining the appellee.

Petition (p. 10 and 11) cites ERIE-TOMPKINS, supra, charging the Circuit Court is undermining its basic philosophy, yet omits to depict the basis for its charge. The ERIE case states that the law of the state concerned is to be followed, to wit legislative enactment, and the law enunciated by its highest court. Neither condition is complied with. The petition (p. 2) in Question 2, admits "there is no state decision directly in point *", and as to question 1, no decision in New Jersey has stated that the trial judge must decide the issue of discovery.

Petition (p. 9, 10, 12, 15-17, 19) cites LOPEZ v. SWYER, supra. Therein, in 1962, plaintiff had a radical mastectomy for breast cancer and defendant radiologist treated her until February 1962. Burns and pain occurred. In March 1967 plaintiff overheard a physician state that defendant placed plaintiff on a table and went out for coffee and "there you see, gentlemen, what happens". Suit was started September 1967. Reversal of summary judgment was affirmed. The Court said, Mountain, J., at p. 273:

> "Like so many other equitable doc-

trines, it has appeared and is developing as a means of mitigating the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law."

The Court (p. 274) in an expounding non-decisive manner thought that the trial judge "can better" reconcile the respective equitable claims of opposing parties and gave a general non-exclusive view that "ordinarily" the determination should be made by the judge at a preliminary hearing.

The petition (p. 12) cites HEAVNER v. UNIROYAL, INC., 63 N. J. 130, 305 A. 2d 412 (1973) that N.J.S.A. 2A:14-2 (p. 3) which states the limitations are 2 years next after the cause of action accrued. Heavner in fact says (p. 18):

"It was well settled that in an action for personal injuries, the two year statute, computed from the date of occurrence of the injuries (or in some situations the date of their discovery), would govern*" (underscore ours).

Therein residents of North Carolina sued in New Jersey the manufacturer (Uniroyal) and seller (Pullman) of a tire that exploded causing injury in North Carolina. Uniroyal was a New Jersey corporation and Pullman was a Delaware corporation. Both defendants did business across the nation. The Supreme Court of New Jersey were "assuming the action at bar against both



manufacturer and retailer can properly be considered as one for breach of a 'contract for sale' within the intendment of that section." The Court said:

"In other words, the four-year provision of section 2-725 is to apply only to non-personal injury claims otherwise within the scope of the chapter."

A blight on our book to dismiss a litigant seeking our shore for better rights or civil relief in calamitous cases as forum shoppers or bargainers. SWIFT v. TYSON, 16 Peter 1, 10 L. Ed. 865 (1842) may have swiftly granted overseer-like federal relief and not delegate the dispair of ERIE-TOMPKINS. This is the more surprising when the manufacturer of the exploding tire had technical, legal or corporate ties in New Jersey.

The petition (p. 15-17) cites FOX v. PASSAIC GENERAL HOSPITAL, 71 N. J. 122 (1976). This case clearly sustains appellee. Moreover it was never alleged, much less evidenced, that petitioner was "peculiarly or unusually prejducied" by the filing of the suit within 2 years of discovery of the cancer, aside from the later knowledge (to wit, 5 months) of correlationship, which appellee under LOPEX had the right to rely upon. In the FOX case, a drain in plaintiff's abdomen was discovered in surgery on March 2, 1971 left during prior surgery. Suit was filed December 1, 1972. The court used the term "equitable approach" to the bar of limitation, following LOPEZ v. SWYER.

The Court could well have meant an approach of justice or fairness and avoid an ambiguous encroachment on an antiquated system of equity long abolished as if two systems existed, law and equity Mysteriously, juries never wore with the equity branch. Justice and fairness are at work where a litigant has no knowledge of the existance of the cause of action. The Court said (p. 5):

> "It is convenient as well as logical to take the position that since the causes of action does not accrue until discovery thereof, under the rationale of the discovery principle Fernandi v. Strully, 35 N. J. 434, 450 (1961) the plaintiff should normally have the benefit of the legislative policy determination that he institute his action at any time within two years of strict accrual." (underscore ours).

The petition (p. 17) fortuitously injects that it would be too taxing for a jury to determine burder of proof in different causes of action. The function of a jury is and has been to determine the burden of proof or evidence.

The petition (p. 19) cites MORAN v. NAPOLITANO, 71 N. J. 133 (1976). Therein basicly defendant treated plaintiff for a chronic ulcerated colitis on September 21 1971. In December 1972 a physician assessed the treatment as malpractice. On Jan. 9, 1974 plaintiff sued. Defendant moved for summary judgment contending the suit was not filed timely. The Court af-



firmed judgment denying summary judgment and said (p. 134):

> "Of the two basic issues presented on this appeal, our opinion in Fox, supra, is determinative of one."
>
> "We then held that notwithstanding that plaintiff discovered his cause of action for malpractice prior to the expiration of two years from the date of the actionable conduct, he nevertheless will ordinarily be allowed two full years from the date of such discovery to bring his action."

Petition (p. 7) cites APPELT v. WHITTY 286 F. 2d 135 (7 Cir. 1961). Therein a suit was brought against an Illinois resident for injuries in an automobile accident by plaintiff as next friend of an injured minor. A motion to dismiss for lack of diversity was made. The court held that disputed issues of jurisdictional facts may be heard and determined by the Trial Court. His deposition abundantly showed he was emancipated and that his domicil was Chicago. There were no issues of credibility or subject of demeanor for a jury. Jurisdictional issues are matters within the law realm.

GILBERT v. DAVID, 235 U.S. 561, 35 S. Ct. 164, 59 L. Ed. 360 (1915), cited in petition (p. 17) that since a court determines jurisdiction of the court on place of citizenship, it should determine issues of fact in discovery of a cause of action. The deduction on its face is far

fetched. Therein the Supreme Court stated that it was discretionary with the trial judge to submit the issue to the jury. The Court said, at p. 363:

> "But while the court might have submitted the question to the jury, it was not bound to do so; *"

BEACON THEATRES, INC. v. WESTOVER, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) which petition cites (p. 18) that there is nothing inconsistent with federal practice in having issues tried by a judge without a jury. Therein a mandamus was sought to require a District Court Judge to vacate orders alleged to deprive of a jury trial of issues. Fox had a contract to show first run films in an area for a period of time to lapse before they were shown elsewhere. The issue of competition between theatres was a jury question. The entire tenor of the decision was to protect the right to trial by jury. The Court said, Burton, J. (p. 997):

> "The Declaratory Judgment Act and the Federal Rules 'necessarily affects the scope of equity * This is not only in accord with the spirit of the Rules and the Act * but is required by the provisions in the rules that' the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a Statute of the United States shall be perserved...inviolate."

The petition (p. 18) cites COLGROVE v.



BATTIN, 413 U. S. 149, 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973) to support the bland position that a jury trial need not protect as to everything, only issues that are jury issues. Nowhere in the decision is there any support for this carefree phrase. To the contrary it strongly sustains plaintiff. Therein, the plaintiff sought relief from a rule that limited jury trials to 6 persons, contending right to a jury of 12 persons. The defendant never said plaintiff was not entitled to a jury trial, but to one with lesser persons. The Court said, per Brennan, J. (p. 529):

> "Keeping in mind the purpose of the jury trial * in criminal and civil cases, to assure a fair and equitable resolution of factual issues * In Williams, we rejected the motion that the reliability of the jury as a fact finder...(i.e. a function of its size. *"

The issue of knowledge of a cause of action is not only a jury issue, protected by the Seventh Amendment, but preserved by 56 F.R.C.P.

Petition (p. 18) cites GUARANTY TRUST CO. v. YORK, 326 U. S. 99, 65 S. Ct. 1464 89 L. Ed. 2079 (1942). Therein action was instituted by a non-acceptance note holder against the trustee in the equity side of the district court where jurisdiction was based on diversity of citizenship. The application of the state statute of limitations was in issue. The Court, Frankfurter, J., said (p. 2084):

> "This does not mean that whatever equitable remedy is available in a State court must be available in a diversity court suit in a federal court, or conversely that a federal court may not afford an equitable remedy not available in a state court. Equitable relief in a federal court is of course subject to restrictions; the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery, * a plain adequate and complete remedy at law must be wanting * the constitutional right to trial by jury cannot be evaded * " (underscore ours).

Therein, the Court reversed and remanded. The District Court found for defendant and the Circuit Court reversed. The aforesaid appears as an early erosion of ERIE-TOMPKINS, supra.

RAGAN v. MERCHANTS TRANSFER & WAREHOUSE CO., 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949) is cited in petition (p. 18). Therein the court held the service was an integral part of the statute. That feature makes the case at Bar different because there is no issue of integrality. This case, as pointed out in the reply brief below, has come an adverse "talk of the town" case and is so regarded in PRASHER v. VOLKSWAGEN OF AMERICA, INC., 480 F. 2d 947 (1973), 8th Cir., So. Dakota, wherein the complaint was sustained by the filing of the suit, thus tolling the statute, despite the South Dakota's statute which required service for commencement of the cause.



The Court said (p. 950):

> "Some courts have taken umbrage in the Hanna language to believe that Ragan was overruled. Other courts such as our own have disagreed and under circumstances on all fours with Ragan, have reluctantly felt compelled to apply the law of Ragan. Undoubtedly the total dismissal of Ragan would not sadden anyone--perhaps only because of the harshness of the rule to the individual case. * The Supreme Court, although perhaps tenuously in the eyes of many, still sought to distinguish Ragan in Hanna. The Court made direct reference to the fact that Ragan did not involve a federal rule and broad as the state rule with which it purportedly clashed, 380 U. S. at 470, 85 S. Ct. 1136 and the Court additionally observed the following Rule 4(d)(1) did not involve, as it did in Ragan a situation where application of the state rule would wholly bar recovery *".

In juridical annals, the superlative is reached that no one would be saddened by the scrapping of Ragan.

HANNA v. PLUMER, 380 U. S. 460, 14 L. Ed. 8, 85 S. Ct. 1136 (1965) presented a direct conflict between Federal Rule of Civil Procedure 4 (d)(1) and a state law governing service of process. The Court therein, Warren, J., overtly said (p. 16):

> "The Erie rule has never been invoked to void a Federal Rule * "

and at p. 18:

> "The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome determinative' and integral relations stoppers where there are affirmative countervailing (federal) considerations and where there is a Congressional mandate (the Rules) supported by constitutional authority."

And Harlan, J., concurring (at p. 20), questioned the goodness of Ragan:

> "* particularly Ragan, which if still good law * I think the decision was wrong *".

and at p. 18:

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state created rights, would be to disembowel either the Constitution's grant of power over federal procedure, or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d)(1) is valid and controls the instant case.
>
> "So Rule 56 of the Rules of Civil Practice is not to cease to function to enable a state judicially suggested inconclusive procedure to do its disembowelment". (underscore ours

The petition (p. 18) cites the case of



RICHARDS v. UNITED STATES, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962) to indicate the extent the federal court would look to local law in applying a state statute of limitations. The case is inapposite. No issue of state statute of limitations was involved. Therein suit was for a death by airplane traveling from Oklahoma to New York, which occurred in Missouri. The Missouri Death Act limits recovery to $15,000.00. The Court followed the death act of Missouri.

The petition (p. 18) cites ROSS v. BERNHARD, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970) for the proposition that there is nothing inconsistent with federal practice in requiring the equitable issue of discovery to be tried by a judge alone. The case is not in point. There is no limitations issue involved. The Court in fact stressed the derivative right of the stockholders to the jury trial of the corporation. The case sustains appellee. Therein, the Court said White, J. (p. 736):

> "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."

The petition (p. 18) cites United States v. Matlock, 415 U. S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), which case is inapplicable. It deals with evidence as a basis for consent to a warrantless search at a suppression hearing --a procedural matter. In the instant case, we have an issue of knowledge, the

time of which governs the continuance of a cause of action. Knowledge of a cause of action is a salient ingredient of the cause of action.

UNITED STATES v. YELLOW CAB CO., 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951) is cited by the petition (p. 18). The petitioner states that there is nothing inconsistent with federal practice that equitable issue raised by delayed discovery be decided by a judge without a jury. The petition completely ignores Rule 56, F.R.C.P. which protects a litigant's right to a jury trial. Therein a suit was brought for injuries against the defendant taxicab company, whose vehicle was in collision with a U. S. mail truck. The company impleaded the U. S. Government, under the Federal Tort Claims Act, which requires claims to be tried without a jury. The Court said that although the plaintiff had the right to a jury trial as to the company, there could be separate trials. This case is inapposite because the appellee has a right to trial by jury of the issue of discovery of the causes of action.

The Uniform Commercial Code to promote uniformity is national in scope and provides for a 4 year limitation for breach of warranty for damages, including injury. Appellee sued in warranty and negligence. The application of the 4 year limitations renders the warranty cause timely regardless of discovery. The decision of the New Jersey Court, HEAVNER v. UNIROYAL, supra, wherein the Court dismissed the residents of North Carolina, returning



them to no relief, obiter dicta in limiting breach of warranty for personal injury to 2 years, is a threat to the goal of uniformity. The Supreme Court should follow the code and direct the 4 year limitation. In HANNA v. PLUMMER, supra, the Supreme Court stepped in when there was a threat to the goal of uniformity.

Anomalous, arbitrary and unconstitutional it would be that the litigant has a 4 year limitation to recover damages for breach of warranty for a defect in the product, and yet is confined to a 2 year limitation for damages for injuries due to the same defect.

UNIFORM COMMERCIAL CODE, White Summers Hornbook Series, at p. 4, reports:

> "By 1968 the Code was effective in forty-nine states, the District of Columbia and the Virgin Islands. Section 2-725 of the Code provides:
>
> "(a)n action for breach of any contract for sale must be commenced within four years after the cause of action accrued."

The discovery of the correlation of fibro cystitis of decedent resulting in partial amputation of the left breast took place November 22, 1974 when Dr. Harold Schwartz, the prescribing physician, stated in a deposition that the defendant's product aggravated that condition, and renders the claim for it as timely.

The petition (p. 19) cites ARUTA v.

KELLER, 134 N. J. Super. 522, 342 A. 2d 231 (App. Div. 1975). Therein plaintiff sued for injuries sustained on a machine. The wife sued for loss of consortium. Although the court sustained the amendment subsequent to the statute as to the proper party to be used, the issue here was not there, to wit a difference in knowledge between the spouses.

The petition (p. 11) claims that the Circuit Court increases the number of diversity cases in federal court, causing a burden. The framers of the constitution, did not allow the "burden" of diversity to prevent its protection. The case of EKALO v. CONSTRUCTIVE SERVICE CORP. OF AMERICA, 46 N.J. 82 at p. 94 quoted approvingly from FALZONE v. BUSCH, 45 N.J. 599 (1965):

> "* the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases."

The case of KIMPEL v. MOON, 113 N.J.L. 220, 174 A. 209 (Sup. Ct. 1934), cited by the petition (p. 19) sustained plaintiff. Therein the court said (p. 222):

> "* A husband who sues for loss of consortium sues, not in his wife's right, but <u>in his own</u> *". (underscore ours.

The petition (p. 19) cites KNUTSEN v. BROWN, 96 N.J. Super. 229, 232 A. 2d 833 (App. Div. 1967). Therein the plaintiff



Rita Knutsen sued for injuries sustained in an automobile accident, wherein the vehicle was driven by her husband. Suit was later brought for medical malpractice, the parents suing per quod. The case does not involve a spouse's per quod. Nevertheless the per quod was dismissed as untimely, yet the infant's case continued.

PATUSCO v. PRINCE MACARONI, INC., 50 N. J. 365, 235 A. 2d 465 (1967) cited in petition (p. 19) sustains the opinion of the court below that the per quod claim is independent. Therein, the Court stated (Weintraub, C.J.) at p. 368:

> "The law recognizes a man's relational interest in his wife and gives him a cause of action against one who negligently involves that interest. <u>Although the husband's consortium claim is thus distinct</u> from the wife's, it will fall if the wife was contributorily negligent." (underscore ours)

and again at p. 372:

> "Although the subject is not discussed in their authorities, we think it implicit that where the wife is thus permitted to sue for her medical, past or future, the husband's contributory negligence would not bar her."

Petition (p. 19) cites ROST v. BOARD OF EDUCATION OF FAIR LAWN, 137 N. J. Super 76 (in error cited as 79), 347 A.

2d 811 (App. Div. 1975). This case does not serve petitioner. Therein, the father joined in his per quod claim with his son for injuries to the son. The statute lends the same time to file a notice of claim to both. The case lacks the feature herein of a difference in knowledge of the cause of action.

ROTHMAN v. SILBER, 90 N. J. Super 22, 216 A. 2d 18 (App. Div. 1966) is cited in petition (p. 19). Therein the plaintiff wife received an anesthesia which caused stiffness and pain. The Court, at p. 33, stated in support of denials of summary judgment:

> "4,5 Proceedings for summary judgment under R.R. 4:58 (while they) are not to be used as a vehicle for the trial of disputed facts upon affidavit * to the end that all doubts are to be resolved in favor of the opponent of the motion *".

There was no evident set of different facts as to the spouse's respective knowledge as herein.

Petition (p. 19) cites SCOTT v. RICHSTEIN, 129 N.J. Super. 516, 324 A. 2d 106 (Law Div. 1974) which lends no aid to petitioner. It merely states that since the action for loss of consortium is derivative, there is more logic in bringing the suit under a single complaint than where there are separate injury claims. The independence of the spouse's claim per quod is maintained. It merely stems from the same injury.



TACKLING v. CHRYSLER CORP., 77 N. J. Super. 12, 185 A. 2d 238 (Law Div. 1962) cited in petition (p. 19) is in agreement with the Circuit Court that there is no specific New Jersey authority on discovery and per quod claim of the husband. The petition says it pays to be indifferent or ignorant. There is no proof of indifference. The petition would penalize a spouse for lack of knowledge, whereas LOPEZ v. SWYER, supra, as its basis rules that lack of knowledge tolls limitations statute. Therein, the wife sued for injuries sustained when the wheel fell off a new car which she operated. Her husband sued per quod. The husband evidently learned of the wheel incident when the wife was injured. The husband in the case at bar did not have comparable knowledge. The Court therein merely stated the period of limitation statute is the same.

The petition says (p. 18) that the Circuit Court fashioned a new rule as to the husband's independent per quod claim by a separate discovery. The discovery was differently timed. To predicate his cause of action, not on his knowledge, but on her knowledge, is a deprivation of due process.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. MORRIS
Counsel for Appellee
744 Broad Street
Newark, N. J. 07102

(Appendices Follow)



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Public Health Service
Food and Drug Administration
Rockville, Maryland 20852

May 5, 1976

Mr. William R. Morris, Attorney
744 Broad Street
Newark, New Jersey 07102

Dear Mr. Morris:

This is in reply to your letter dated April 15, 1976, regarding the withdrawal of sequential oral contraceptives from the market.

We have enclosed a FDA Talk Paper dated December 22, 1975 and a news release dated February 26, 1976, concerning the sequential oral contraceptives. As mentioned in the press release paper the sequential oral contraceptives were withdrawn from the market by the manufacturer because of three serious potential risks associated with the use of these products:

1. A higher potential risk of thromboembolic phenomena because of the high content of estrogen used reopposed in most of the drug administration cycle.

2. The higher risk of morbidity and mortality from a higher pregnancy rate with sequential products compared to most combination oral contraceptives.

3. The higher potential risk of adenocarcinoma of the endometrium in patients receiving sequential prod-

ducts as suggested by Silverberg and Makowski (copy enclosed) in their collection of cases.

There has been no substantial evidence based on adequate and well-controlled studies submitted to the Food and Drug Administration identifying a patient population to which the use of the sequential oral contraceptive is justified in view of the above cumulative potential risks.

We have also enclosed a copy of the statement by Alexander M. Schmidt, M.D., Commissioner of Food and Drug Administration, before the Subcommittee on Health, et. al., United States Senate on January 21, 1976, in which the sequentials are discussed on page 9. At this time the order regarding the withdrawal, and a notice of withdrawal of approvals of the New Drug Applications has not yet issued.

If we can be of further assistance, please let us know.

Sincerely yours,

/signed/
Harold C. Krema
Consumer Safety Officer
Division of Metabolism
and Endocrine Drug
Products
Bureau of Drugs

Enclosures



NEWS (SEAL) NEWS

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

76-8 (Food and Drug Administration)
FOR IMMEDIATE RELASE PINES (201) 443-3285
February 26, 1976 (Home) (202) 363-4104

The Food and Drug Administration (FDA) announced today that all three U.S. manufacturers of sequential birth control pills have notified the FDA they are discontinuing marketing of these products.

It is estimated that 5-10 percent of the 10 million women taking birth control pills in the United States are taking sequentials.

The products to be withdrawn from the market are: Oracon, made by Mead-Johnson and Co., Evansville, Indiana; Ortho-Novum SQ, made by Ortho Pharmaceuticals, Raritan, New Jersey; and Norquens, made by Syntex Laboratories, Palo Alto, California.

Alexander M. Schmidt, M.D., Commissioner of Food and Drugs, said: "We asked the makers of sequentials to withdraw their products because they pose an unnecessary potential risk compared with other marketed birth control pills. I believe the companies have acted responsibly in voluntarily taking the withdrawl actions."

"Women who are taking sequentials should finish out their cycles and contact their physicians for a prescription for a different birth control pill, or select another method of contraception," Dr. Schmidt said.

Sequential birth control pills contain an estrogen alone for most of the pill-taking cycle, and an estrogen and progestin for the remaining part of the cycle. The other birth control pills, known as "combination" pills, combine estrogen and progestin for the entire three-week cycle.

FDA decided that sequentials should be removed from the market after concluding:

(1) They are somewhat less effective that combination birth control pills.

(2) They are associated with a higher risk of blood clotting than the combination pills.

(3) They appear to have the potential for a higher risk of cancer of the uterus than the combination pills.

In late December, FDA asked the three U.S. manufacturers of sequentials to submit information identifying which women were likely to benefit from taking sequentials compared to the combination pills. All three companies submitted data but did not prove to FDA's satisfaction that the sequentials meet a unique requirement for any group of women.

FDA last week informed the companies of its conclusion and asked that the products be withdrawn. The three companies then notified FDA they will take the voluntary withdrawal action.

FDA intends to notify physicians of the action through its FDA DRUG BULLETIN. FDA did not ask the companies to recall existing stock because there is only about two months supply of sequentials on the market.